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IN THE

Supreme Court of the United States

..... TERM, 19.....

No. 712

EARLE E. KYNETTE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California and Brief in Support Thereof.

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Your petitioner, Earle E. Kynette, a resident and citizen of the State of California, respectfully presents to this Court his petition for a writ of certiorari addressed to the Supreme Court of the State of California, commanding said Court and the clerk thereof, to certify to this Court the record and proceedings of the case in said Court where your petitioner was appellant and the respondent the people of the State of California, together with its opinion therein and its ruling upon the petition for rehearing for review and determination of said cause by this Court. The reasons relied on for the issuance of said writ and upon which your petitioner believes a writ

ought to be issued and which will be more fully stated herein may be summarized as follows:

1. The petitioner has been denied due process of the laws of the State of California in contravention of the requirements of the Fourteenth Amendment of the Constitution of the United States.

2. The petitioner has been denied equal protection of the laws of the State of California in contravention of the requirements of the Fourteenth Amendment of the Constitution of the United States.

In this behalf your petitioner states the following facts:

That for many years prior to the 18th day of February, 1938, your petitioner was a member of the Los Angeles Police Department. That during the year of 1937 and up to approximately the time of the indictment your petitioner held the rank of acting captain on the Los Angeles Police Department, and as such was in charge of the Special Intelligence Unit of that department. That it was among the official activities of the Special Intelligence Unit commanded by your petitioner to make such secret investigations as were ordered by the chief of police and to install dictographs in places frequented by persons suspected of criminal activities. That in the fall of 1937 under the direction of the chief of police your petitioner undertook the investigation of one Harry Raymond, a former police officer, who was suspected by the chief of police of complicity in the preparation of false affidavits tending to defame and degrade certain members of the Los Angeles county grand jury, which said affidavits were to be used in connection with a mandamus proceeding to be brought on behalf of the minority members of the grand jury to compel the grand jury as a body to investi-

gate into vice conditions allegedly then existent as well as the connection of certain local notorious characters and political personages then holding public office.

That is the course of this investigation your petitioner assigned subordinate officers to rent a house in close proximity to the house occupied by the suspect Harry Raymond for the purpose of keeping surveillance over the activities of the said Raymond and also in an effort to install a dictograph in the house on the premises occupied by the said Raymond. That your petitioner was assigned certain subordinate officers to shadow Raymond and keep him as much as possible under observation.

That frequent reports of this surveillance were written up by your petitioner and delivered to the district attorney of Los Angeles County, as well as the chief of police.

That on the 14th day of January, 1938, an explosion occurred at the premises occupied by the suspect Raymond. This explosion undoubtedly was caused by a bomb which was placed in Raymond's automobile and attached to the mechanism in such a way that when Raymond applied his foot to the starting apparatus the bomb was set off. Raymond received multiple cuts and bruises from the flying metal fragments which injuries confined him to his bed for some period of time. That this event caused great public excitement in the community. That shortly thereafter a complaint was filed against your petitioner in the Municipal Court charging him with assault with a deadly weapon. A preliminary hearing in the Municipal Court upon the charge instituted by the complaint was set for approximately February 21, 1938. That while these proceedings were pending a subpoena was issued directing your petitioner under compulsion to

appear before the Los Angeles county grand jury, which, in the meantime, had commenced an investigation into the Raymond bombing. That your petitioner, in response to the subpoena, and under compulsion, appeared before the grand jury as directed on or about February 18, 1938, approximately three days prior to the date set for his preliminary hearing on the proceedings instituted by the complaint. That under the laws of the State of California your petitioner was not permitted to have counsel present at the time he appeared as a witness before the grand jury. (*California Penal Code,* Sec. 925.)

That your petitioner was sworn and placed upon the stand and asked by the district attorney of Los Angeles County, in substance, if he knew that under the Constitution of the United States said petitioner would not be required to testify to anything which in his opinion would incriminate him or involve him in the commission of any crime, to which your petitioner answered in the affirmative. That your petitioner stated that he had a copy of the Constitution of the Uinted States with him. The district atorney asked he petitioner if, in view of the fact that he was not required under the Constitution of the United States to testify if he desired, to testify before the grand jury. Your petitioner reported that he did not desire to testify, the district attorney then asked your petitioner if he desired to stand on his constitutional rights, and your petitioner answered in the affirmative. Whereupon, your petitioner was excused from the grand jury room.

That thereafter the grand jury returned an indictment accusing your petitioner and others of four public offenses: (1) conspiracy to murder Harry Raymond; (2) attempted murder of Harry Raymond; (3) assault with

intent to commit murder upon Harry Raymond; and (4) maliciously using explosives near a building occupied by Harry Raymond with intent to injure him.

That your petitioner pleaded not guilty to each of the four offenses, respectively. That thereafter the matter came on for trial, and your petitioner took the stand as a witness on his own behalf and gave exculpatory evidence explaining the reasons why he and his police squad were in the vicinity of the Raymond home and denying any participation in or connection with or knowledge of the planting of a bomb in the car of the victim Harry Raymond, and on cross-examination, over objection of counsel, the district attorney was allowed to interrogate your petitioner as to whether or not when he appeared before the Los Angeles grand jury he had refused to testify on the ground that any evidence he gave before the grand jury might tend to incriminate said petitioner, and that he had exercised his constitutional privilege. The ruling of the trial court was predicated upon the theory that the claim of constitutional privilege against self-incrimination could be shown as tending to impeach the veracity of the witness when he gave exculpatory testimony at his trial. That the trial court thereafter, of its own motion, instructed the jury in its formal charge as follows:

> "In this case where a witness, whether he be a defendant or not, has answered a certain question with an answer devoid of any admission of guilt and it is shown that at some other time and place to substantially the same question he made answer 'I decline

to answer on the ground the answer might tend to incriminate me' or words to that effect, the two answers are inconsistent the effect of this may be to disregard the testimony of the witness but it does not prove the truth of the former statement."

The jury thereafter retired to deliberate, and then returned four verdicts: a verdict finding your petitioner guilty of assault with a deadly weapon; a verdict finding your petitioner guilty of attempted murder; and a verdict finding the petitioner guilty of malicious use of explosives, and a verdict finding your petitioner not guilty of the charge of conspiracy to commit murder.

That your petitioner, in accordance with the procedure in this jurisdiction, appealed to the District Court of Appeal of this State, Second Appellate Division. That the appeal was perfected, and the District Court of Appeal rendered a decision holding that the action of the district attorney and of the trial court as above described has deprived your petitioner of his fundamental constitutional right against self-incrimination.

That the State, respondent in the appeal, being dissatisfied with the decision of the District Court of Appeal, petitioned the Supreme Court of the State of California to hear the matter. That the Supreme Court of the State of California granted a hearing in the case of your petitioner and returned its opinion on this matter, declaring in substance, that where a defendant claimed the privilege before a grand jury and gave exculpatory testimony at his trial evidence of the prior claim of privilege against self-incrimination may be introduced for the purpose of discrediting the testimony of said defendant witness on his trial.

That your petitioner in the time allowed by law formally requested the Supreme Court of this State to rehear and reconsider this matter, which petition for a rehearing was, by the Supreme Court, denied. The Supreme Court affirmed the judgment of the lower court, sentencing your petitioner to imprisonment in the state penitentiary under the indeterminate sentence law of this State for a minimum period of one year and a maximum period of life.

That the petition for a rehearing was denied by the State Supreme Court on August 29, 1940. That extensions of time within which to file this petition for a writ of certiorari have been granted upon application by order of this Court. Your petitioner is advised that the judgment of the Supreme Court of the State of California is final and is erroneous, and this Honorable Court should require the case to be certified to it for its review and determination.

Your petitioner further amplifies the grounds for requesting that a writ of certiorari be ordered herein.

Your petitioner has been denied due process and equal protection of the laws of the State of California in contravention of the Fourteenth Amendment of the Federal Constitution for the following reasons:

First: The ruling of the State Supreme Court approving the use at the trial as evidence your petitioner's prior claim of privilege against self-incrimination when petitioner appeared before the grand jury that indicted him, destroyed the guarantee contained in the provision of the State Constitution that no person shall be compelled to be a witness against himself in any criminal case, thereby denying to your petitioner equal protection under the laws of the State of California because the Supreme Court of

the State of California construed this petitioner's assertion of his constitutional right as evidence, and further declared it to be evidence that could properly be used to impeach and discredit the petitioner's testimony given on his own behalf at the trial. That your petitioner was by the decision of the Supreme Court denied in a criminal case a right that has been by the Constitution of this State freely granted to all persons within this jurisdiction.

Second: That the official representative of the State of California, the district attorney, falsely represented to your petitioner at the time your petitioner appeared as a witness in response to a subpoena before the grand jury. That said petitioner was invested with a right under the provisions of the Constitution of the United States to assert a privilege against self-incrimination, and that the said district attorney wrongfully informed this petitioner that under the Constitution of the United States, your petitioner was not required to testify before the Los Angeles County grand jury on any subject that might involve petitioner in the commission of any crime.

That after the district attorney had misled your petitioner in the manner aforedescribed into asserting a privilege against self-incrimination on the false statement that he was guaranteed such a right by the Constitution of the United States while appearing before the Los Angeles County grand jury, the district attorney subsequently introduced at the trial evidence of the fact that your petitioner had so asserted his claim against self-incrimination before the grand jury all for the purpose of discrediting the exculpatory testimony given by your petitioner in his own behalf at his said trial. That the Supreme Court in approving such conduct on the part of the district attorney and in sustaining the conviction of your petitioner

procured by such a method has thereby denied your petitioner due process of law and has approved the use of evidence obtained against your petitioner through the misrepresentation made to him by the district attorney as to his legal rights at the time he appeared before the grand jury.

Third: That the right of protection against self-incrimination is guaranteed by the Constitution of the State of California to one appearing before the grand jury in a criminal case. That this right is fundamental and imbedded in the law of nature and is an ancient principle so long recognized that it cannot be destroyed without denying to a person under such circumstances as your petitioner found himself in in the instant case the guarantee of due process of law.

Your petitioner in the brief accompanying this petition will supply authorities upon the foregoing propositions. Your petitioner presents herewith a certified copy of the record in his cause which consists of the following:

1. Excerpts of pertinent portions of the official transcript of the clerk of the Superior Court of the State of California in which your petitioner was tried, setting forth the material portions of the record of the lower court in which your petitioner was tried.

2. Excerpts of pertinent portions of the official Superior Court reporter's transcript of the testimony taken at the trial of your petitioner, particularly relating to the questions here involved pertaining to the use by the district attorney of evidence of your petitioner's claim of privilege before the grand jury for the purpose of discrediting him as

a witness, along with the objections of counsel for your petitioner and the ruling of the trial court.

3. Excerpts from the official Superior Court clerk's transcript setting forth the instruction given by the trial court to the jury authorizing the jury to consider the evidence of your petitioner's claim of privilege before the grand jury as discrediting the testimony your petitioner gave at the trial. Also, the formal written instruction requested by your petitioner on the subject and refused by the trial court.

4. Excerpts from the opinion of the District Court of Appeal of the State of California declaring in substance that your petitioner had been denied his constitutional guarantees through the allowance of evidence on his claim of self-incrimination asserted before the grand jury into the record at his trial for the purpose of discrediting the testimony there given by your petitioner.

5. The opinion of the Supreme Court of the State of California sustaining the action of the trial court allowing evidence of petitioner's claim of privilege against self-incrimination to be used as impeaching evidence at petitioner's trial.

6. A copy of the minutes of the Supreme Court of the State of California containing the order denying your petitioner's application for a rehearing in that Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court directed to the Supreme Court of the State of California, sitting at San Francisco, California, commanding

the said court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Supreme Court of the State of California in this cause, to the end that said cause may be reviewed and determined by this Honorable Court as provided by law, and that the said judgment of the Supreme Court of the State of California be reversed by this Honorable Court, and for such further relief as may seem proper. And your petitioner will ever pray.

RICHARD H. CANTILLON,
Of Counsel,

Signed:
A. J. Ritter
Counsel of Record.

State of California, County of Los Angeles—ss.

Richard H. Cantillon, being first duly sworn, on oath deposes and says: that he is the counsel for petitioner Earle E. Kynette; that he has read the foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied a duly certified copy of the transcript of record which accompanies the petition herein, being the transcript of record in the case at bar; that the matters in said petition are in the judgment of this affiant duly supported in and by said transcript of record, and that he knows of the above proceedings had, and that the acts in said petition herein stated are true to the best of his knowledge and belief.

RICHARD H. CANTILLON,

Subscribed and sworn to before me this 20th day of January, 1941. Ina E. Comstock

~~MARCELYN DOUDEN~~,

Notary Public in and for the State of California, County of Los Angeles.

My commission expires ~~August 15, 1943~~ Nov 9 1941

Residing at Los Angeles, California.

I do hereby certify that I have carefully examined the foregoing petition for a writ of certiorari and the allegations thereof are true, as I verily believe, and in my opinion the petition is well founded and the case is one in which the prayer of the petition should be granted by this Court.

RICHARD H. CANTILLON,
For Petitioner.

A. G. Ritter

Of Counsel.